

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,) Case No.
) 1:19-cr-2032-SMJ-1, 2
Plaintiff,)
) September 30, 2020
v.) Yakima, Washington
) Evidentiary Motion Hearing
JAMES DEAN CLOUD (01); and) Day 2, Volume II
DONOVAN QUINN CARTER CLOUD) EXCERPT -
(02),) Williams/Prosecution
) Closing
Defendants.) Pages 1 to 29

BEFORE THE HONORABLE SALVADOR MENDOZA, JR.
UNITED STATES DISTRICT COURT JUDGE

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1 (September 30, 2020; 7:58 a.m.)

2 THE COURTROOM DEPUTY: All rise.

3 (Call to Order of the Court.)

4 THE COURT: Good morning. Please be seated.

07:58:59 5 THE COURTROOM DEPUTY: Matter before the Court is *United*
6 *States of America v. James Cloud and Donovan Quinn Carter Cloud*,
7 Cause No. 1:19-cr-02032-SMJ, Defendant 1 and Defendant 2. Time
8 set for motion hearing.

9 Counsel, please state your presence for the record,
07:59:20 10 beginning with Government counsel.

11 MR. BURSON: Good morning, Your Honor. Richard Burson
12 and Tom Hanlon for the United States. Sitting at counsel table
13 as well is Special Agent Troy Ribail with the FBI.

14 THE COURT: Good morning to all three of you.

07:59:30 15 MR. BURSON: Good morning.

16 MR. HANLON: Good morning.

17 MR. McENTIRE: Good morning, Your Honor. Jay McEntire,
18 Lorinda Youngcourt, and Jeremy Sporn on behalf of James Cloud.

19 THE COURT: Good morning.

07:59:40 20 MR. SMITH: Good morning, Your Honor. Mark Larranaga
21 and Rick Smith on behalf of Donovan Cloud.

22 THE COURT: Good morning.

23 Good morning, gentlemen.

24 DEFENDANT JAMES CLOUD: Good morning.

07:59:50 25 DEFENDANT DONOVAN CLOUD: Good morning.

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5

1 THE COURT: Now, we last left on -- last left on
2 Detective Williams and his testimony. We were having some
3 issues with the video. Sounds like the video is as good as it's
4 going to get.

08:00:19 5 So I think we could proceed forward, Mr. McEntire.

6 MR. McENTIRE: Correct, Your Honor.

7 THE COURT: Okay. So why don't we -- why don't we get
8 the detective back on.

9 (Witness MICHAEL WILLIAMS approached.)

08:00:49 10 THE COURT: Good morning, sir. You are still under
11 oath.

12 THE WITNESS: Okay.

13 THE COURT: Please have a seat. And make sure that mic
14 is close to you so we can capture everything you're saying.

08:01:08 15 With that, Mr. McEntire, you can proceed.

16 MR. McENTIRE: Thank you, Your Honor.

17

18 CONTINUED CROSS-EXAMINATION

19 BY MR. McENTIRE:

08:01:13 20 Q Good morning, Detective Williams.

21 A Good morning.

22 Q Detective Williams, when we left off yesterday we were
23 discussing Yakima County Sheriff's Office Policy 603.6.

24 Refresh your recollection on where we left off?

08:01:27 25 A Yes.

1 Q What I'd like to do is bring you back to that policy, same
2 page that we left off before, which is Defendant's
3 Exhibit 1002-3. And what I'd like to do, Detective, is direct
4 your attention to the third paragraph down in that policy.

08:01:53 5 Reading, quote: The member presenting the lineup to a
6 witness should do so sequentially; i.e., show the witness one
7 person at a time and not simultaneously.

8 Detective Williams, you indicated yesterday that you did
9 have an opportunity to refresh your recollection on the
08:02:15 10 interview that you did with EZ on June 10th.

11 A Yes.

12 Q And during the course of that, you watched the video start
13 to finish all the way through?

14 A Yes.

08:02:29 15 Q During the course of your interview with EZ, would you
16 agree that EZ was able to look at more than one photo at the
17 same time when she was going through the various lineups?

18 A Yes.

19 Q So you would agree, based upon your review of this policy
08:02:43 20 now, that that was not, in fact, a sequential lineup; that that
21 was a simultaneous.

22 A Correct.

23 Q Which, again, is in violation of YCSO policy.

24 A Yes.

08:02:58 25 Q Detective, I'm going back to the previous page, 1002-2, on

1 the YCSO policy.

2 Drawing your attention to this section (reading): In order
3 to avoid undue influence, witnesses should view suspects or a
4 lineup individually and outside the presence of other witnesses.
08:03:24 5 Witnesses should be instructed to avoid discussing details of
6 the incident or of the identification process with other
7 witnesses.

8 Detective, when you left off the interview -- I guess maybe
9 let me start here: Did the video recording capture the full
08:03:42 10 interaction that you had, as well as Detective McIlrath, with
11 EZ?

12 A I believe it did, yes.

13 Q So there weren't any substantive conversations that were
14 occurring before the -- the recording started.

08:03:55 15 A No.

16 Q Or after.

17 A No.

18 Q Do you recall, after refreshing your recollection to the
19 video, did you leave that interview with an instruction to EZ
08:04:06 20 not to discuss the interview that you just had with other
21 witnesses?

22 A I don't think I did, no.

23 Q Detective Williams, that's all the questions I have. Thank
24 you.

08:04:43 25 THE COURT: Mr. Smith?

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Williams/Continued X/McEntire

8

1 MR. SMITH: Pardon me?

2 THE COURT: Any questions?

3 MR. SMITH: No. No questions, Your Honor.

4 THE COURT: Okay. Any additional questions?

08:04:54 5 MR. BURSON: Nothing from the United States, Your Honor.

6 THE COURT: Okay. May this witness be excused?

7 MR. McENTIRE: Yes, Your Honor.

8 THE COURT: Mr. Burson?

9 MR. BURSON: Yes, Your Honor.

08:05:04 10 MR. HANLON: Yes, Your Honor.

11 THE COURT: Okay. Thank you. You're excused.

12

13 (Additional proceedings were reported but not requested to be
14 transcribed.)

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EXCERPT OF PROCEEDINGS

THE COURT: Thank you.

Mr. Burson?

MR. BURSON: So, Your Honor, I want to start off by talking about the two tests that we're dealing with here. One is the due process clause test under *Perry*. And we call it the due process test, but what it really is it's an exclusionary rule case. Why do we exclude evidence when it's obtained under the due process? We exclude evidence when it's obtained in violation of due process because we want to deter certain police misconduct. We don't do it to remedy the due process violation. The due process violation already happened.

THE COURT: Counsel argues that the misconduct is the policy violations, and they articulate several; that that's the reason, and specifically one of them which led, with regards to LV, to -- in their argument is that led them to -- him to go out and investigate the Internet and get this additional information.

MR. BURSON: So I'll start by talking about policy violations.

THE COURT: Okay.

MR. BURSON: So the test under *Perry* is that before we get into a judicial inquiry into reliability of eyewitness identification, we have to ask whether that identification was procured under unnecessarily suggestive circumstances arranged

1 by law enforcement.

2 The policy violations at issue here did not create an
3 unnecessarily suggestive lineup.

4 THE COURT: They argue that it was arranged in the sense
04:22:34 5 that they failed to follow their own policies in telling the
6 witness, "Hey, don't go and look at the media," number one; and
7 that -- and their -- in their mind, that that is a -- that that
8 is a violation, and therefore it was, in fact, arranged.

9 MR. BURSON: So I do want to focus, then, on the policy
04:22:59 10 itself. The policy itself is to advise -- or to request that
11 witnesses do not contact the media. And the reason it says
12 "request," I believe it's dropped in a footnote at least in the
13 2019 policy, is because agents cannot instruct --

14 THE COURT: Right.

04:23:16 15 MR. BURSON: -- people not to talk to the media.

16 And I think that's significant in two ways. So the
17 phrase "contact the media," what does that mean? And there
18 actually is no dispute over what "media" is. That's not the
19 dispute. I agree social media is media. The dispute is over
04:23:38 20 the word "contact."

21 And we can sit here in this room as lawyers, and
22 Dr. Laney can sit there as a scientist, and we can quibble over
23 what "contact" means. What it is -- what it means to contact
24 the media. But the fact is, this policy wasn't written for
04:23:59 25 lawyers. It wasn't written for scientists. It's not a piece of

1 legislation that we're going to dig into the legislative history
2 on and try and figure out what "contact" means. This was
3 straightforward policy advice presented for FBI agents;
4 nonlawyers, nonscientists.

04:24:20 5 I think it's unreasonable, given the audience for that
6 phrase, "contact the media," to define that as: Don't view
7 media. Don't look at Facebook.

8 THE COURT: You -- you agree that -- I mean, I think the
9 testimony bears out that the special agent did not advise him
04:24:44 10 not to do that.

11 Correct?

12 MR. BURSON: I agree that Special Agent Ribail did not
13 advise him to do that. However, there's no connection between
14 him failing to advise him to do that and JV viewing Facebook.
04:24:58 15 And the reason I say that is because let's say Agent Ribail had
16 walked up to JV -- or they're already together -- after the
17 lineup had instructed JV verbatim from the FBI policy. JV, he's
18 not even an FBI agent. He certainly is not a lawyer, and he's
19 not a scientist. "By the way, I'm required to request that you
04:25:16 20 do not contact the media."

21 No normal person thinks that means that I can't get on
22 my computer and look on the Internet. And so that's what JD did
23 anyway. So the failure to tell him "do not contact the media"
24 didn't change his behavior in any way, because JV didn't call
04:25:41 25 the media, he didn't -- he didn't contact the media, not in the

1 way that normal people speak.

2 And under the definition, as the defendant wants it, of
3 "contact the media," I think it's important to consider what
4 that would include, because if there is causation here between
04:25:59 5 the failure to advise "do not contact the media" and seeing the
6 public safety announcement, for there to be causation to exist,
7 that means their definition has to include public safety
8 announcements. So not only don't contact the media, don't look
9 at news sites, don't look at Facebook, don't look at public
04:26:20 10 safety announcements.

11 So even in this situation, where your family has been
12 attacked, someone held a gun to your kid's head, tried to kidnap
13 him, took your car, terrorized your family for a span of
14 minutes, and they're still at large and believed to be armed and
04:26:40 15 dangerous, and you know, because your a resident of White Swan,
16 that they just killed five other people nearby, don't view any
17 public safety announcements.

18 That cannot be the advisal, and that cannot be included
19 in the definition of "contact the media." That's an
04:27:00 20 unreasonable way to interpret that phrase.

21 But in order for, like I said, in order for the failure
22 of Agent Ribail to tell him "do not contact the media," in order
23 for there to be causation between that and him seeing that
24 wanted poster, the definition of "contact the media" would have
04:27:16 25 to include that poster.

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Argument by Mr. Burson

13

04:27:44 1 THE COURT: What about the other argument that -- that
2 while -- that announcement with the poster of James Cloud was
3 arranged, I guess it would be, by the agencies that were being
4 overlooked by the FBI or working in coordination with the FBI,
5 because that came out of an advisory from, yes, the tribe, but
6 the tribe got it from someone, presumably, you know, another
7 agency, maybe the tribal police or -- I mean, what about that
8 argument, that it was coordinated in that way?

04:28:04 9 MR. BURSON: Are we talking about the first advisal or
10 the second advisal? I just want to know for --

11 THE COURT: The second. Well -- yeah, the second one is
12 what I'm referring to.

13 MR. BURSON: The second one, I believe, was someone with
14 Yakama Nation Tribal Police --

04:28:18 15 THE COURT: Correct.

16 MR. BURSON: -- who called Yakama Nation, the Tribal
17 Council's office, essentially, who runs that Facebook page,
18 after they found out, oh, no, these aren't the guys, or those --
19 those weren't the people that were arrested, or at least not
04:28:34 20 James Cloud at that time.

21 Even if, even if we consider that law enforcement
22 involvement, I don't think that --

23 THE COURT: Was that tribal police? Or was there
24 evidence that -- let me ask it this way: Was there evidence
04:28:52 25 that that was tribal police presented in this hearing?

1 MR. BURSON: There was not, although following
2 testimony, I reviewed the reports again, and so I can shed some
3 light on it in a little more detail, if the Court would like --

4 THE COURT: You're not a witness, Counsel.

04:29:03 5 MR. BURSON: -- but I don't know that it's helpful. But
6 it was -- there was some involvement of tribal police telling
7 the council's office to, "Hey, they're not actually in custody."
8 That led to the posting.

9 THE COURT: Okay.

04:29:19 10 MR. BURSON: Who drafted it, who typed it is unclear,
11 and I'm afraid probably going to be lost to the sands of time.
12 My understanding is someone in the Council's office.

13 But certainly we can't include that as the misconduct.
14 That was a necessary posting. It was necessary from a public
04:29:42 15 safety standpoint. I don't think that that is the type of
16 conduct that we want to deter. And that's the whole point of
17 the exclusionary rule, is to deter.

18 If this happened all over again, would we want the
19 Tribal Council to second-guess should we put this information
04:30:04 20 out there?

21 No, of course not. No resident of White Swan would want
22 that. No resident of Yakima would want that.

23 And the other policy violations -- this is what I
24 touched on -- they themselves don't create a suggestive
04:30:28 25 circumstances. There's no evidence that Agent Ribail created

1 any suggestive circumstance. Even Dr. Laney could not point to
2 any evidence that there was any suggestion going on with this
3 lineup. And without some sort of suggestion created by law
4 enforcement improperly, we don't even get to a judicial inquiry
04:30:55 5 under the Biggers factors, or whatever factors the Court wants.
6 The Court wanted to add more factors. I think the Court should
7 stick to the Biggers factors, and I can address that briefly, if
8 the Court would like, but I think -- understood.

9 I do also want to talk about Rule 403, because Rule
04:31:19 10 403 -- I will concede that Rule 403 is -- is theoretically
11 applicable here, and I will concede that there is language in
12 decisions that are either precedential or -- or what are called
13 persuasive -- I don't find them persuasive, I'll get to the why
14 in a second, but that are generally called persuasive, that
04:31:42 15 suggests that Rule 403 is applicable here.

16 Now, other courts have explicitly said that Rule 403
17 could be explicable with eyewitness identification, even where
18 there is no exclusionary rule culpability, as here, frankly.

19 But I want to re-emphasize the word "theoretical" when I
04:32:00 20 say that, because as a practical matter, it just doesn't happen.
21 It -- the defense relies heavily on *Dennis*. I believe it's the
22 case out of the Third Circuit -- it is the case out of the Third
23 Circuit. I believe -- I believe they mentioned it in their
24 closing argument. In their words, it was a tour de force.

04:32:21 25 Well, first, *Dennis* was Brady decision. It was an en

1 banc or en banc decision, however you pronounce it, by the Third
2 Circuit, which means up to 12 judges. Of the 12 judges or so,
3 one wrote this part of the opinion, the concurring opinion that
4 is relied on by the defense. One other joined it.

04:32:42 5 And I think it's important to notice -- to note what's
6 happening in that concurring opinion. That concurring opinion
7 is detailed, and it spends most of its time talking about the
8 eyewitness identifications that were at issue in *Dennis*. The
9 whole issue in *Dennis* was there were eyewitnesses presented at
04:33:05 10 trial, and the State didn't turn over some Brady material that
11 would have been able to impeach those eyewitnesses, or at least
12 reduce their credibility. I believe there were two witnesses at
13 issue; three Brady violations in total.

14 The -- the en banc opinion just found that, yeah, that
04:33:25 15 is a Brady violation. Why? Because that evidence could have
16 been used to impeach at trial. They never said: Because that
17 evidence could have been used to exclude the evidence altogether
18 under Rule 403.

19 So the concurring opinion goes into detail about some of
04:33:38 20 the problems with eyewitness identification, and the Court heard
21 a lot about that today. And some of the terms would sound
22 familiar from -- from that concurring opinion, such as other
23 witness reactions influencing other witnesses, photo arrays and
24 lineup construction, blinded techniques. You know, the judge in
04:34:03 25 that concurring opinion says, look, blinded techniques are

1 important. And as to why it's important, the *Dennis* jurors
2 would have been in a far better position to assess the
3 reliability of the three courtroom identifications had they been
4 informed of the importance of blinding procedures.

04:34:21 5 Keyword: The jurors.

6 With respect to lineup construction, the district court,
7 according to the concurring opinion, should have provided the
8 jury with an explanation of how this may have affected the
9 witness' identifications.

04:34:40 10 Other witnesses influencing witnesses. The jurors
11 should have been instructed about this possibility.

12 The opinion also talks about stress, as did Dr. Laney;
13 weapons-focus, as did Dr. Laney; memory decay over time. And
14 all of it the recommendation is the jurors should have been
04:35:03 15 informed of these variables. This is not an opinion saying that
16 this evidence should have been excluded under Rule 403.

17 *Jones*, which is cited by the defense as well, in that
18 case, it's an interesting fact pattern. The witnesses at issue
19 were inadvertently informed of the defendant's identity, given
04:35:28 20 his name, by the state prosecutor's office. It ended up being
21 an adopted case federally. They Googled the person, found his
22 mugshots online, told investigators, "Hey, this is the guy. We
23 found him online," before even being asked questions by the FBI,
24 and were allowed to make an in-court identification. That
04:35:50 25 district court, again, cited by the defendants, said, okay, Rule

1 403 applies. But in the availability of cross-exam, jury
2 instructions, expert testimony, unfair prejudice is adequately
3 mitigated.

4 Which brings me to my point about unfair prejudice.

04:36:08 5 This is not a prior conviction or a prior bad act that rings a
6 bell that kind of sits by itself in a vacuum. It's hard to
7 imagine bringing an expert and explaining to the jury why that
8 prior felony is so bad. Right? It's hard to imagine a closing
9 argument that can fully mitigate what's been done there. And
04:36:27 10 it's hard to imagine jury instructions, although we have them,
11 that can fully push back.

12 Here, with eyewitness identifications, we do have
13 experts, as we saw today, who come in and say, look, this was a
14 non blinded procedure. That's why this is important. Look,
04:36:47 15 there was suggestion going on here, possibly. We don't know,
16 but all these procedures that went wrong, we don't know; there
17 could have been suggestion. That's essentially what Dr. Laney
18 was testifying to today.

19 There's -- there's jury instructions that are -- that
04:37:03 20 are fulsome. That was what the Third Circuit was advocating
21 for, primarily, that concurring opinion was fulsome jury
22 instructions to explain to a jury, look, eyewitness
23 identifications have problems.

24 And, finally, there's cross-exam --

04:37:15 25 THE COURT: I want to turn your attention, if you could,

1 to LL. Both Mr. McEntire and Mr. Smith talk about the courts,
2 in their request to exclude LL -- LL's identification because,
3 in the words of Mr. Smith, it's coming out of nothing. That is,
4 that, you know, first there was a nonidentification. Then there
04:37:47 5 was sort of a comment made, and it sounds like that might have
6 been related to -- that happened after media interviews and
7 meetings with his family about who were the Clouds.

8 And why shouldn't the Court, under that -- those
9 circumstances, exclude that identification as nonreliable?

04:38:13 10 MR. BURSON: Because I think that -- so now is a good
11 time to talk about, I guess, probative value and prejudice. And
12 I think the point here is -- unfair prejudice. Keyword. And I
13 think the point here is that the unfair prejudice factor can be
14 mitigated. I don't dispute the fact that it is significant to a
04:38:39 15 jury when someone stands up and points at the defendant's table
16 and says, "I recognize that person" --

17 THE COURT: Right.

18 MR. BURSON: -- from the -- from the incident," which,
19 by the way, brings me to a side note. No one is going to come
04:38:52 20 in here and say, "James Cloud shot me." Okay? We understand
21 the Court wouldn't allow that without mountains of foundation.
22 That's not what we're asking for here, at least not someone
23 without prior knowledge who we can't lie a foundation for.

24 But Mr. Smith is right. That's not what we're talking
04:39:11 25 about today. What we're talking about today is recognition.

1 And there are plenty of questions that can be asked on
2 cross-examination to cast doubt on the reliability of someone's
3 recognition. And there's also explanations for --

04:39:33 4 THE COURT: But I think the argument is that the Court
5 wouldn't typically just allow any Joe Schmo to come in here and
6 say, "Yep, yep, that's the one, right there. That's the guy
7 that did this," and, in their view, that this identification by
8 LL is tantamount to that, in that there was a nonidentification,
9 and then only through these other series of events that now,
04:39:53 10 apparently, there is more than that. I mean, I think that's the
11 argument. And so it's -- it's a little different.

12 MR. BURSON: It is different from a typical
13 identification in that there was originally a nonidentification,
14 and then subsequent to that, during an interview with the FBI,
04:40:12 15 there was an identification by name, associating it with an
16 individual in a red shirt.

17 But that can be asked on cross-examination. And there
18 may very well be an answer for it. The answer may be, "Yeah, I
19 didn't know it was James Cloud at the time, and I didn't
04:40:36 20 identify him in the lineup, but then I saw a picture later, and
21 I recognized him when I saw him on TV, and I also learned his
22 name was James Cloud." It's a very reasonable explanation.
23 We're just asking that he be able to provide it to the jury
24 after, presumably, he's asked about it on cross. That is called
04:40:58 25 a trial. And that is how unfair prejudice is mitigated. That's

1 all we're asking for.

2 Defense is asking to skip the jury instructions, skip
3 cross-examination, skip presentation of expert testimony on
4 eyewitness identification, skip any commands from the Court,
04:41:19 5 cautions from the Court, skip closing argument regarding
6 eyewitness identification, and jump right to Rule 403, which I
7 don't think it's controversial to say Rule 403 is a last resort.
8 When those other things cannot adequately mitigate unfair
9 prejudice, then we have Rule 403. Defense kind of wants it both
04:41:41 10 ways. They want -- they want to look at the Court and say:
11 Your Honor, look how unreliable this ID is. He -- he first made
12 a misidentification, and then later on he said, "Oh, that's --
13 that's -- that's James Cloud." And then with another defendant
14 he said, "Your Honor" -- or he said, "No, that's" -- too many
04:42:07 15 names at this point -- "that is somebody not here," and then
16 later on says, "That's Donovan Cloud."

17 THE COURT: Um-hmm.

18 MR. BURSON: They -- they put that forth, rightly so, to
19 the Court to say: Clearly there is no probative value here.
04:42:26 20 But at the same time, they act as though a jury won't be able to
21 take that very simple evidence, very easy to comprehend -- he
22 didn't pick him out of the lineup, he attached a name later, he
23 confused a guy in blue shirts -- that very presentable,
24 easy-to-digest information, they act as though that will not
04:42:46 25 mitigate any of the prejudice, and that's just not true. It's

1 just not reasonable.

2 THE COURT: Can we move on to EZ? And I think it's been
3 established, certainly by the testimony and by the admission of
4 the deputy, that, you know, he made some mistakes. He
04:43:05 5 acknowledges those, and -- and in not following a certain set of
6 procedures.

7 Counsel argues that those specific violations
8 potentially result -- well, really, that there's no way of
9 knowing, necessarily, how that influenced the -- the not having
04:43:26 10 a real blind presentation or double-blind presentation versus
11 having him look at it and then, in their view, gesturing or
12 conveying other nonverbal cues.

13 And I guess in -- don't they have a point about that?

14 MR. BURSON: They do have a point that there is an issue
04:43:53 15 with nonblinded lineup procedures, as the Court in -- or, I'm
16 sorry, as the concurring opinion in *Dennis* said: Look, there's
17 a problem when you don't use nonblinded procedures. These
18 things are important.

19 But also like that concurring judge in *Dennis*, I think
04:44:09 20 the remedy is jury instructions coupled with eyewitness
21 testimony -- I'm sorry, expert testimony regarding eyewitnesses,
22 like Dr. Laney will testify about the importance of blinded
23 procedures. The jury will understand that. It's not so hard to
24 digest that this Court is the only body that can make that
04:44:32 25 ruling. And that's your mitigation.

1 Now, if there were procedures here in this lineup that
2 actually were suggestive, we might have a different
3 hypothetical. But we don't. And I know there's some
4 disagreement about what that pen was. Frankly, I think because
04:44:53 5 it was made after a recognition, I think it's -- defense is
6 really overplaying what that was. And I think similarly to the
7 suggestion to write on the lineup what the witness had just said
8 I don't think is suggestive. I certainly don't think it's
9 unduly suggestive, which is the keyword here.

04:45:12 10 THE COURT: So let me ask you this: So you're conceding
11 that you're going to allow expert testimony on eyewitness
12 identification in this case? Should the Court allow this?

13 MR. BURSON: I think we're -- we're too early there,
14 Your Honor, to decide. Well --

04:45:24 15 THE COURT: You just made the argument, Counsel. You
16 can't have it both ways.

17 MR. BURSON: There's -- there's a lot of factors that go
18 into it. There's scope of expert testimony, who the expert is,
19 is it always allowable. But we'll certainly entertain it, and I
04:45:36 20 invite the Court or defense to use my words against me --

21 THE COURT: Well, believe me, I will not be using your
22 words against you. I have a feeling I know who will, but I will
23 not be using your words against you.

24 MR. BURSON: I invite that. But for today, I just want
04:45:53 25 to focus on is Rule 403 applicable. My point here is there are

1 tools to mitigate prejudice down to the point where it's no
2 longer unfairly prejudicial. Counsel for the defense is right;
3 a lot has been learned over the years with respect to eyewitness
4 identification. And it's because of that we have the jury
04:46:13 5 instructions we do now, we have expert testimony on this -- on
6 these things, defense attorneys are more equipped with a little
7 more knowledge so they can do cross-examination, they know what
8 to say during closing argument. We've come a long way.

9 As we learn more about misidentification, the dangers of
04:46:34 10 it, we've learned how to mitigate it, and we're just asking that
11 those tools be used --

12 THE COURT: Well, and the defense is saying: Yeah, you
13 learned a lot, but you didn't follow them. That's what they're
14 saying.

04:46:45 15 MR. BURSON: I disagree. I actually --

16 THE COURT: Okay.

17 MR. BURSON: I actually do think courts have been
18 adapting. And I understand that, like with everything else,
19 court precedent doesn't necessarily keep up to science. Not --
04:47:00 20 I think it would be naive to make that suggestion. But the fact
21 that we have opinions like *Dennis*, concurring opinions like
22 *Dennis*; the fact that we do have courts entertaining Rule 403
23 applicability, although not really applying it to eliminate
24 evidence, but at least considering Rule 403 in the context of
04:47:20 25 eyewitness identification, the fact that we have those things,

1 that shows that courts have come around on this issue. But they
2 still let juries hear it. Where they have changed is they allow
3 the admissibility of expert testimony.

04:47:38 4 I quoted some cases in my briefing where experts were
5 actually disallowed. Now, I want to make clear, I didn't do
6 that because I'm making an argument now that expert testimony
7 isn't relevant. I was showing the inapplicability of other
8 cases. But my point in bringing it up now is to show that I
9 think if you looked at the landscape for excluding testimony
04:47:54 10 now, I think we would be in a different landscape, which is to
11 say that even though courts have learned more, the -- the result
12 of courts learning more about eyewitness identification is to
13 let in certain evidence that maybe they thought irrelevant
14 before. And, again, that's all we're asking for here. I'm not
04:48:12 15 waving any objections to evidence, by the way. But it's
16 available.

17 THE COURT: Okay. Any final point?

18 MR. BURSON: No, Your Honor, unless the Court has any
19 direct questions for the Government.

04:48:30 20 THE COURT: I don't, not at this point.

21 I -- actually, I'll allow, if you -- do you have any
22 final point, Mr. McEntire?

23 MR. McENTIRE: Very brief points, just in response to --

24 THE COURT: Only if they're very brief.

04:48:58 25 MR. McENTIRE: Your Honor, Mr. Burson said, quote, we

1 want to deter certain police conduct.

2 And my response would be -- is: We don't just want
3 officers to follow policy. We want to know it exists in the
4 first place, which is one of the problems that we had here.

04:49:17 5 Second point that I would bring up is that Mr. Burson
6 had -- is -- with respect to JV, is pinning the misconduct on
7 the wrong event. He is pinning the misconduct on the wanted
8 poster, and the misconduct is actually on Special Agent Ribail's
9 failure to provide that instruction. So just providing that
04:49:38 10 clarification.

11 Three, I think *Dennis* is being taken out of context in
12 that this is an appeals court reviewing a habeas decision under
13 EDPA, that was a state case, going through the state Supreme
14 Court process. And so their comments on that these were --
04:49:57 15 there should be jury instructions and other of these comments
16 were provided in the context of the very unique posture that
17 *Dennis* presented.

18 Fourth, Mr. Burson referencing *United States v. Jones*.
19 There was actually specifically in that *Jones* opinion a 2017
04:50:14 20 district court decision that was referenced in respect to Rule
21 403, there was no -- I just pulled it up again and reread it --
22 there actually was no policy violation by police. There was no
23 actually lineup to begin with. What happened is -- is witnesses
24 became aware of an individual charged, and then they went to
04:50:32 25 look that information up. So, again, we're in a different

1 procedural posture.

2 Next point is that the United States called LL's lineup
3 a misidentification --

4 THE COURT: Counsel, I think I'm on five points,
04:50:44 5 although you said three, so I think you're done.

6 Thank you.

7 MR. McENTIRE: You're welcome, Your Honor.

8 THE COURT: All right. Mr. Smith? I allowed him.

9 MR. SMITH: I have nothing. Thank you, Your Honor.

04:50:55 10 THE COURT: Mr. Burson?

11 MR. BURSON: Nothing, Your Honor. Thank you.

12 THE COURT: All right. We're also set for a status
13 conference. We have one scheduled for October 27th. I guess we
14 can defer sort of a more robust discussion at that point to
04:51:22 15 address many -- the plethora of other issues involved in this
16 case. So we'll hold off on that.

17 With regards to a decision on these matters, I -- I
18 promised I would look at certain things that were discussed,
19 certainly in closing, and I -- I definitely want to do that.
04:51:43 20 And so I will -- I appreciate the arguments today. I think it
21 was well argued the last couple days.

22 And anything else that we need to address today?

23 MR. BURSON: Nothing from the Government, Your Honor.

24 MR. McENTIRE: Nothing from James Cloud, Your Honor.

04:51:59 25 MR. SMITH: Nothing, Your Honor.

1 THE COURT: All right. Again, thank you for your
2 presentations, and that will conclude this matter.

3 THE COURTROOM DEPUTY: All rise.

4 (Hearing concluded at 4:52 p.m.)
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C E R T I F I C A T E

I, KIMBERLY J. ALLEN, do hereby certify:

That I am an Official Court Reporter for the United States District Court for the Eastern District of Washington in Richland, Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 28th day of October, 2020.



Kimberly J. Allen, CRR, RMR, RPR, CCR(WA)
Washington CCR No. 2758
Official Court Reporter
Richland, Washington